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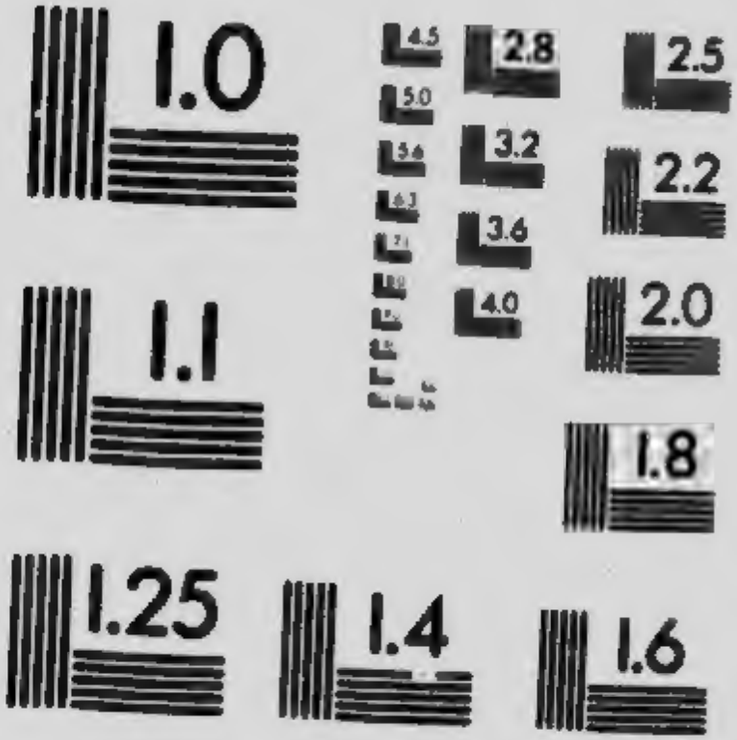

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CRIMINAL LAW AND PRACTICE.

By The Honorable William Renwick Riddell, LL. D., F. R. Hist. Soc., Etc., Justice of the Supreme Court of Ontario.

Delivered June 24, 1914.

Anatomists tell us that in our bodies are many remains of organs which were beneficial in the earlier stages through which our race has come, but are now not only useless but actually harmful or dangerous. If it were Nature's way to create a species *uno flatu*, and if she were to plan mankind anew, there are many things which she would omit, many improvements she would make; appendicitis would be unknown, and the supra-renal capsules would do their work better.

But that is not the method of Nature (perhaps you will prefer to say, of God); everywhere in plant and animal life we find survivals, relics, remains; and it is well if these are only interesting but harmless, and not full of peril to the organism as well.

So, too, in the institutions of civilized nations there are everywhere survivals from an earlier stage—the noble families of Europe, who have a different kind of blood from ordinary humanity—and boast of *der Geburtsadel*, which no one can acquire, however able, brave and successful in life—the created nobility of Britain, consisting largely of successful lawyers and brewers—the orders of Knighthood and Companionship which find their way even beyond the seven seas. If the United States escapes these distinctions, its people more than make up for it in dubbing aldermen and their like "Honorable," in the never failing crop of Colonels and in the gorgeous array of dignitaries of the secret societies, from the Supreme Potentate of the Nobles of the Mystic Shrine to the Tyler of the Subordinate Lodge of the Royal and Select Sons of Ham.

It was once necessary that a strong and wise man should lead the army and direct the policy of the clan; it was to be expected that the children of such a man would be more com-

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potent than those of less illustrious birth; and so noble families were of use. But no one would now, however high a Tory he might be, say that "the son of his father" is by birth a legislator to be desired; and the House of Lords has lasted thus long only from being constantly recruited from the other classes by the inclusion of able and successful commoners.

Because peculiar circumstances—perhaps the small size of the Chapter House at Westminster—brought about two Houses of Parliament in England, the United States, the Dominion of Canada, all the States of the Union, and two of the nine provinces of the Dominion have two Houses in their Legislature; and it is hard to convince some Americans and a few Canadians that this is not the ideal state of things. We in Ontario have got along for nearly fifty years without feeling the need of an Upper House; but then, of course, we are Radicals. Whether if any one were set to it to frame a constitution for a people who never have had one, he would erect two houses of legislation to correct each other's errors, each one must decide for himself; we in Ontario want none of it.

Law, which is the direction laid down by the community for its own governance, and which expresses the very genius of the people, could not be exempt from the rule; whether substantive or adjective, it must *ex necessitate* smell of the past. Not a few of these defects in the law which are most persistently and vehemently complained of, are due to the very nature of the law itself, and are the remains of organs formerly of value but now almost if not quite useless and, it may be, harmful; these the people in their corporate capacity have not seen fit to remove, or the courts, through their instinctive conservatism, have not yet seen fit to abolish by the exercise of inherent or donative power.

Not only are the courts conservative, but the common people have in all matters connected with the courts the same tendency—what they have been accustomed to is *prima facie* right, an innovation must prove and justify itself.

The legislator must always bear in mind the inertia of the mass of the community; the laissez faire method, the "Cannot it be let alone?" of Lord Melbourne, is the easiest and most likely to cause public discontent. *Quieta non movera* is a maxim dear to cautious minds; and unless there is a real

popular demand or urgent persistence of ardent reformers it is apt to be the governing principle of those in authority.

It must never be forgotten that in our system of government, legislation is not only by the people, but for the people, and no government can go far in advance of public sentiment. In the administration of law, it is a favorite saying of mine that it is almost as valuable that the litigants and the public generally believe that fair play has been given and justice has been done as that the decisions are sound in law. And I am the more and more convinced that the true function of a court is not performed when the decisions are absolutely right according to law unless at the same time the public at large believes in the righteousness of the decisions.

It nevertheless may not be without value to consider what criminal law and procedure would be if one were at liberty to disregard established usages and reverence for the past. If I do that mainly by considering the law and practice with which I am most familiar, it will be but natural and no harm will be done.

Most crimes have two distinct elements, a wrong to an individual and a wrong to the state but this view is not antique but comparatively late. In primeval times the trespasser wronged some individual—for the idea of the state had not been developed, though we can see it ever and anon peeping through the adumbration. The wronged must vindicate his wrong by his own hand, and if he was the weaker he was helpless. When the court was instituted to decide rights the person injured must come into court and complain, and even then in many cases he must be prepared to rely upon himself, for the wrongdoer might insist upon the right to justify his conduct by sword or club. When trial by battle became obsolete, the necessity did not cease for the injured himself to take all the labor and risk of a lawsuit to obtain his rights. And no English speaking people has ever yet devised any method of giving every man his due, *suum cuique tribuere*, without forcing him to be himself a litigant. Some day, some one may destroy that appendix vermiformis.

It would answer no good purpose to trace the steps whereby the King's Court took cognizance of crime; but it is not unworthy of notice that except in offenses against the state, criminal prosecutions were long left entirely in the hands of private prosecutors. Saying nothing of the present practice in

England, crown prosecutions, i. e., prosecutions for crimes, are on this continent (speaking generally) in the hands of public officers appointed for that purpose, and at least theoretically, the person who may have been injured by a trespass which is also a crime has no say in the criminal proceeding. This is as it should be. A crime is an offense against the people at large, and the people at large, the state, the crown, should conduct all prosecutions for such offenses.

In Ontario there are two kinds of crime which the injured person must himself prosecute (viz., criminal libel and nuisance), although he is allowed to use the name of the crown in such prosecution. This is an anomaly and should be changed. There is no more reason why a person should be forced to prosecute one who has stolen his character than one who has stolen his cow. Some public spirited attorney general will one day use the knife here.

While it was admitted that a crime might be a civil trespass, it was for some time considered—indefinitely indeed and without express decision—that the trespass was merged in the crime and gave no cause of action. This has long ceased to be law, if it ever was law.

But another legal proposition was advanced which has a little vitality still in some jurisdictions. Under the English system of private prosecution it is obvious that there were many temptations to omit to prosecute where no benefit except that afforded by revenge for injury would accrue to the injured. It was upon this consideration that the theory was based that no action would lie until the injured had prosecuted the wrongdoer criminally. It is more than likely that the King's Courts desired prosecutions for more mercenary and less laudable reasons than public justice; but the theory just spoken of answered well enough.

Such considerations never should have any part in countries in which criminal law is administered by a public officer; and in any case it is gross hardship on the individual to deprive him of redress until he had given time and money to do for the state what the state should do for itself.

In at least one state in the Union the common law rule still subsists, contrary, as I venture to think, to the true principles of democracy.

For reasons more or less cogent, more or less satisfactory, no civilized state attempts to punish every instance of wrong-

doing. Some classes are left *in foro conscientiæ*, the liar can lie with impunity so long as his lie is a lie *simpliciter*, and does not come within the class of forbidden lie. Thraso's tribe is not yet extinct, but continues spreading itself like a green bay tree, and Barnum's mermaid and Joyce Heth have numerous successors.

So long as the state contents itself with punishing certain classes of wrongdoing only, the people are entitled to know exactly what is forbidden. If there were no direction in the law other than the famous *Honeste vivere, alienum non laedere, suum cuique tribuere*, there would be no need of anything but an enlightened conscience to enable every one to know when an act was unlawful. But that rule never was law in the true sense or anything else than a glittering generality.

For long the judges in fact made while pretending to declare the law: "*est judicis non dare sed dicere legem*" was not even approximately true till comparatively late in our jurisprudence. The English judges declaring the common law to be the perfection of human reason, proceeded to apply their reason to the case before them, and what they found in their reason they declared to be law. The result was as was to be expected; the rulings as to crime at the common law were anomalous and in many cases absurd: a thief of twenty shillings might be hanged, a swindler of twenty pounds go scot free. The horrors of the state trials are in no small measure due to common law notions of crime. Legislation was necessary, and it must be said it was unsparingly resorted to; scores of acts were passed, and offenses manufactured almost without limit. The curious antipathy of English legislators and lawyers to codification was manifest in this field as elsewhere; and it was but the other day that even partial codification was resorted to.

In Canada before 1759-1760, the French law was in force, criminal as well as civil. At the conquest, the British governors introduced the English criminal law as well as they could; and this was confirmed by the Royal Proclamation of 1763, when Canada was ceded to Britain. The English criminal law was brutal and bloody enough in all conscience, but the French was worse, having such choice proceedings as *lettres de cachet*, the rack, breaking at the wheel and the like. The French-Canadians made no complaint against the English criminal law, although they decidedly objected to

the English civil law; this disheated their old customs, and they were never tired of expressing their wonder that intelligent people like the English should think their property safer in the determination of tailors and shoemakers than in that of their judges; a wonder which is still very widespread among civilized nations.

When the complaints of the French Canadians were hearkened to by the home authorities, and legislation passed to change the law to suit them, the Quebec Act of 1774 re-introduced the old civil law but retained the English criminal law.

At that time there were very few settlers or inhabitants in what afterwards became Upper Canada; but after the peace of 1783, when the independence of the United States was acknowledged, many loyal subjects of the British Crown gave up home and country that they might keep their faith, the oath of allegiance which they had taken and the flag which had covered them at birth and through life. These cavaliers of the new Revolution made their way in great numbers to the north, crossed the international rivers Detroit, Niagara St. Lawrence, and peopled the wilderness, "but then 'twas British wilderness." They were English-speaking, born under the common law, and were intolerant of any other; *nolunt Angliae leges mutare* as were the barons centuries before. Many representations were made to the advisers of the King; the French Canadians would have none of the common law, the English Canadian none but the common law.

The gordian knot was cut by forming two provinces and allowing a legislature in each to make such laws as were thought suitable to its own province. The Constitutional act of 1791, 31 Geo. III. c. 31, made two provinces, Upper and Lower Canada, which lasted for fifty years.

No immediate change was made by either province in the criminal law, but Upper Canada by the very first act of its first parliament introduced the common law of England in civil matters. From that time until the Union in 1841, the two provinces from time to time amended the criminal law. Speaking generally, these amendments followed *pari passu* the amendments of the criminal law in England. The two provinces were again made one in 1841 by the Union Act of July 23, 1840, 3 and 4 Vict. c. 35; and thereafter the amendments to the criminal law were applicable to both.

The Provinces of Nova Scotia and New Brunswick had also their own criminal law much the same as that of England, so that when in 1867 these provinces were combined with Canada to form the new Dominion of Canada, the whole dominion had practically the same criminal law. The British North America Act gave the subject of criminal law and procedure to the dominion, while the constitution of the courts was allotted to the separate provinces. Prince Edward Island and British Columbia afterwards joined the Dominion, bringing in their own criminal law nearly identical with the law of the original provinces. Manitoba, Saskatchewan and Alberta are new provinces, created by the Dominion, and the Yukon Territory has also been organized—these nine provinces and the Territory comprising all the fully organized portions of the Dominion.

After confederation there were partial codifications from time to time following rather closely the like legislation in the Mother Country; but there continued to be many references to and much consideration of the common law. At length, in 1892, a complete codification was made of criminal law and practice; members on both sides of the House united in a careful examination of precedents, and in consideration of judicial opinions and of the needs of the country; and their joint efforts resulted in the criminal code of 1892, 55-56 Vict. c. 29, which came into force July 1, 1893, and made the criminal law substantially the same throughout the Dominion. Sir John S. D. Thompson, Minister of Justice and shortly after Prime Minister of the Dominion, deserves most of the credit of this legislation; he had been a justice of the supreme court of Nova Scotia and understood the value as well as the practical necessity of such an act.

The code, which is substantially unaltered, although it has been amended from time to time, defines in simple language each of the crimes known to the law. When technical terms are used, they are defined; the elements of each offense are set out so that "he who runs may read," and no one can have the excuse that he could not understand the meaning of parliament. All technical distinctions are wiped out, there are no felonies and misdemeanors, but only offenses; justifiable and excusable homicide are the same; every kind of stealing is theft, whether it would be larceny at the common law or not, etc., etc.

All this grieved the heart of the criminal lawyer; his mystery was not only in danger, it was revealed to the uninitiated; but judges are grateful and the administration of justice is quickened and cheapened and the change has proved wholly satisfactory. Of course, as was to be expected, there is already a body of decision and there must be still more. In our highly metaphorical language it is impossible to make any statement (except of the simplest kind) which is unambiguous, into which ingenuity cannot read two meanings—it is even said that two and two do not always make four but sometimes twenty-two. So, too, imperfections have been found and more will be found which must be corrected by legislation. Nothing is perfect, *humanum est errare.*

I shall not extract the definition of the several crimes: they are much as those given in Bishop or Russell.

What will perhaps be of most interest to an American lawyer is the method of prosecution. All offenses are divided into indictable offenses and those non-indictable. Non-indictable offenses are prosecuted before one or more justices of the peace, the code prescribing with care the number.

Personally, I have always thought that the practice of trying before justices of the peace is a blot on our system; it is of course historical. Whatever may have been the conservators of the peace at the common law, our system of justices of the peace derives from the statute of 1 Edw. III, from and after which all justices of the peace received their commission from the King. They constituted the Court of Quarter Sessions and were given certain powers out of sessions. The office was introduced into Canada with the English criminal law, and justices of the peace have been known in Upper Canada before it became Upper Canada, and still continue. Not being judges, they are appointed by the provincial government; they have no civil jurisdiction and their criminal jurisdiction is strictly limited by statute. They are almost always laymen, but are saved from very gross error by their right of consulting the county crown attorney, a provincial officer appointed for each county to direct the administration of criminal justice.

There are in many counties, and in all cities and in towns of over 5,000 inhabitants, police magistrates, generally salaried officers, appointed by the province. These are almost

always barristers and, having the powers of two justices of the peace, they do most of the inferior judicial work.

It may seem anomalous that while a civil action however small must be tried by a judge who has been appointed by the Dominion and who must when appointed have been a barrister of at least seven years' standing, very grave criminal charges involving heavy fines and terms of imprisonment may be tried by a layman who perhaps has had no training in law. But we Canadians are a practical people, we care not a straw for consistency, and if an institution works well we are apt to retain it, whatever strict logic would say.

To speak now of the practice. One is accused of a crime; an information is laid against him before a justice of the peace, a summons (or if necessary a warrant) is issued, and he is brought before the justice. It may be an offense which one justice may try; if so, he tries it forthwith or on some day arranged; or it may be an offense which requires two justices; if so, he sends for another magistrate unless he has himself the power of two justices of the peace; it may be an indictable offense; the justice proceeds to hear all the evidence against and for the accused, and if a *prima facie* case is made out, he commits for trial.

The two jury courts with criminal jurisdiction are the Supreme Court of Ontario and the Court of General Sessions of the Peace, successors respectively of the Court of King's Bench and the Court of Quarter Sessions. There are a few kinds of crime which are cognizable only in the Supreme Court, such as murder, treason, sedition, piracy, judicial corruption, etc., etc., but all others may be tried at either the Sessions or the Assizes (as the sittings of the Supreme Court is generally called), and it is the tendency to try all in the Sessions which can be tried there.

There are not a few cases in which an accused, if he is brought before a police magistrate, can elect to be tried by the police magistrate at once. Some can be so tried without his consent. If a person is brought before a police magistrate charged with an offense for which he might be tried at the Sessions, the offense not being one for which he may be tried without his consent, the magistrate states to him the substance of the charge and asks if he consents to be tried by the magistrate or desires that the case be sent for trial by a jury—mentioning the date at which probably the case would come up.

If the accused consents to trial by the magistrate, he is tried accordingly without delay. A great majority of the cases are tried by the police magistrate in this way, and not trivial offenses, either—some are crimes calling for seven years, fourteen years, or even a maximum of life imprisonment.

If the accused prefer a jury, the case is investigated before the police magistrate, and if a *prima facie* case is made out, he is committed for trial. Bail may be allowed or refused.

Within twenty-four hours of the arrival of a person in a gaol, committed for trial for an offense within the jurisdiction of the Sessions, the sheriff of the county must notify the judge of the county court (who acts as chairman of the general sessions of the peace) of the name and charge, whereupon the judge must, with as little delay as possible, have the prisoner brought before him. The judge then states to the prisoner the substance of the charge and that he has the option of being tried forthwith before the judge without a jury or to be tried in the usual way by a jury. If the prisoner elects trial by the judge, an early day is fixed for the trial, a simple form of charge is drawn up (the statute gives a form), and the trial is proceeded with. I have already said that in every county there is a county crown attorney; he is appointed for life. It is his duty to investigate all charges of crime and to prosecute them before magistrates and judges of all courts except the supreme court, and he must draw up the charge and prosecute it before the county court judge.

The county court is a court of inferior civil jurisdiction in each county; it is presided over by a judge appointed for life by the Dominion government; the judge must have been a barrister of seven years' standing. In many counties there are more than one judge in the county court, with the same jurisdiction; and they divide the work amongst them. One will take jury, another non-jury cases, or one will take all the county court work and another the division court cases, etc., etc. One (not always the same) acts as chairman of the sessions, and holds the county judge's criminal court which is now being spoken of.

The county judge, in his criminal court, has all the powers of the sessions, and in practice weeds out most of the sessions cases, including not a few of those in which the prisoner has declined to be tried by the police magistrate. Even after electing a jury trial, when before the county judge, the pris-

oner may change his mind, and unless the judge or prosecuting officer thinks it not in the interests of justice, he may be allowed to change his election and be tried by the judge, while if only one of two or more charged with the same offense demands a jury, the judge may send them all to a jury.

If an accused insists on a right to a jury, he must be allowed his choice; and in all cases in which the sessions has no jurisdiction a jury must be had (with negligible exceptions).

A grand jury (in Ontario of thirteen persons) is empaneled to decide as to whether the accused shall be put upon his trial. In the sessions the county crown attorney prepares the indictment; in the supreme court a crown counsel appointed *pro hac vice* by the provincial administration.

Perhaps the most valuable provisions of the code are to be found in that part dealing with procedure. Forms of indictment are given which are declared to be sufficient; and these are of the simplest kind. I have before me as I write a manuscript note book of an eminent Canadian judge of about half a century ago; in that an indictment takes about three foolscap pages. I have as crown counsel drawn many indictments of nearly that length. An indictment under the code will be a line or two in length. Let me copy a few:

"The jurors for our Lord the King present that John Doe murdered Richard Roe at Toronto on May 17th, 1893."

"The jurors for our Lord the King present that John Doe stole an anchor from a ship called The Jane at Coburg on April 20th, 1894."

"The jurors for our Lord the King present that John Doe obtained by false pretences from Richard Roe a horse at Toronto on May 16th, 1895."

All counts of indictments are directed to contain and are sufficient if they do contain in substance a statement that the accused has committed an indictable offense therein specified. The statement may be in popular language and without any technical averments, and it is sufficient if it uses the words of the statute in describing the offense or any words sufficient to give the accused notice of the offense with which he is charged. No count is to be deemed objectionable because it does not give the name of the person injured, defrauded, etc., or the owner of property, or because it does not set out any document or words used, or means by which an offense

was committed, or does not name or describe with precision any person, place or thing, etc., etc.

The substantive part of the code has done away with subtle hairsplitting over definitions of crime—whether the facts of a case show a crime to have been committed depends upon the ideas of Hale and Hawkins, but upon the meaning of certain words used by parliament. So in procedure, the innumerable traps and pitfalls in the way of a crown counsel which had to be looked for and avoided are all gone; the pathway is clear; with the code in his hand and common sense in his mind he cannot make a mistake.

I remember, when a very young practitioner, getting a scoundrel of a client acquitted because the crown counsel had unwarily described the offense as having been "feloniously" committed whereas the statute did not make it a felony; and once, an equally rascally prisoner escaped my prosecution because I had inexactly called a certain document a "receipt."

If the accused cannot fully understand the charge against him—or if his counsel says he cannot—the court may direct particulars to be given. This is an exceedingly rare proceeding. The preliminaries to a trial by indictment almost invariably make it perfectly clear what is meant by the words of the indictment, even if an extremely critical reading of it may find some ambiguity. I once heard a solicitor general of the United States say that he never saw an indictment which he did not perfectly understand on the first reading, and very few in which he could not find ambiguity and uncertainty after a few weeks' study. He would find some difficulty, with all his skill and ingenuity, in finding any uncertainty in the simple statement that A murdered B at Toronto on May 17th, 1914. What need is there of anything more? What difference does it make whether the murder was committed by poison, rifle, revolver or club?

Some of our judges think the grand jury should be abolished; it is a third wheel to the cart, no doubt, and if it had no other duties than passing upon bills of indictment, would not be missed.

The crown witnesses only are heard by the grand jury and a bare majority may find or ignore a bill.

When a bill is ignored, it may be brought before any subsequent grand jury at the option of the crown; if a bill is

found, it is handed to the judge in open court and the jury are addressed by the clerk: "You are content that the court may amend all matters of form altering no matter of substance in this bill you have found?"

The prisoner is arraigned, dilatory pleas are disposed of, e. g., autrefois acquit or autrefois convict, in the usual way. Motions to quash the indictment or for particulars are got out of the way; we have no such things as technical defects, and if there is some error in form the court amends it then and there. In a very active experience, I have known of but one motion to quash an indictment, one plea of autrefois convict, and none of autrefois acquit, since the code came in force. The prisoner pleads; if guilty the case is over unless the court thinks the plea should not be accepted. We shall assume the plea is "Not guilty."

Four days before the opening of an assize or session, any one interested may have a copy of the jury panel so as to make any inquiry he may think proper concerning the jurymen.

Challenges are allowed (as at the common law), twenty in capital cases, twelve in certain others, that is, those which can be punished by imprisonment for more than five years and four in all other cases. These are peremptory challenges. Then there may be unlimited challenges for cause (I never but once saw one), on the ground that the juror's name is not on the panel, that the juror had been convicted of crime for which he was sentenced to death or imprisonment with hard labor or exceeding twelve months, that he is an alien, or that he is not indifferent between the King and the accused; but on no other ground.

The crown is allowed to challenge four peremptorily, but may direct any number of jurors to stand aside until all the jurors have been called, and of course may challenge for cause.

I have never seen it take more than half an hour to get a trial jury even in a murder case. I have never but once heard a juror asked a question; and it is the rarest of cases that the jury is not obtained before the names on the panel have been exhausted.

In all courts but the supreme court, the county crown attorney prosecutes; in the supreme court, at every assizes there is appointed by the attorney general of the province a bar-

rister, generally a king's counsel, to prosecute all criminal cases at that sittings. Almost invariably a barrister from another part of the province is thus appointed.

The crown counsel, being the county crown attorney in the inferior courts and the specially appointed counsel in the supreme court, prepares the indictments and lays them before the grand jury, with the names of the witnesses to be called. The grand jury in our system cannot, *propris motu* direct a bill to be prepared, but can pass only on what are laid before them by the crown.

The same counsel conducts the prosecution before the petty jury.

There is no disqualification of witnesses by reason of interest or crime. Every one charged with crime may give evidence on his own behalf, but cannot be compelled to do so. If he fails to do so, his failure can not be made the subject of comment by judge or prosecuting counsel. The wife or husband of an accused is competent but not compellable in the same way and with the same protection.

In cases of unnatural offenses, incest, indecent acts, seduction and like offenses, vagrancy, neglect of duties tending to the preservation of life, rape, carnal knowledge of a girl under 14, bigamy, feigned marriages, etc., abduction, husband and wife are both competent and compellable witnesses. No disclosure can be compelled of any communication between husband and wife during their marriage. No witness is excused from answering any question upon the ground that an answer may tend to criminate him or may tend to establish a liability to a civil proceeding. But the answer is not to be used against him in any criminal proceeding (except perjury in giving such evidence).

The witness may affirm if he has conscientious scruples against taking an oath, or says he has. If a child does not understand the nature of an oath his evidence can be taken without an oath, but a case must not be decided against an accused upon such evidence alone, it must be corroborated by some other material evidence.

The verdict of a petty jury must be unanimous. If the jury cannot agree, the court may call another forthwith, or may adjourn the second hearing to a future court, admitting the accused to bail or otherwise as the court sees fit.

Let us now look at this practice from an *a priori* point of view.

When the community decided that for its own sake the whole burden of avenging wrong should not be cast upon the individual, it at the same time and for the same reason decided that the alleged wrongdoer should not be punished except after having been proved to be guilty. It is not for the protection of the individual simply or primarily, but for the safety of the state that all civilized nations forbid the punishment of one accused of crime unless and until he has been found guilty thereof by a court. It is no privilege but a right that an accused has to be tried by such a tribunal, and if proof fail, to be set free.

In like manner he has a right to know exactly what he is charged with, and to have fair play in his trial. To let him know with what he is charged, it is right that the charge be put in black and white so that there can be no mistake about it. But surely the accused is rightfully entitled to nothing more in the way of a charge than a document from which he may know precisely what he is charged with.

There may have been a time in the history of English law when there was some advantage to be derived from the long and involved forms of indictment. They certainly were not necessary to tell the accused with what he was charged. The horrible barbarity of the common law at length moved the hearts of judges less brutalized, and they endeavored to mitigate the rigor of the common law." If this had resulted in modification of the existing criminal law by means of legislation, it would have been logical. But English-speaking peoples are not much enamored of logic; they look for a working rule. The judges took another tack; they laid hold of trifling irregularities or defects to allow an accused to escape a terrible punishment. Everything was *in favorem vitae*—except the substantive law, which was much more *in favorem mortis*.

Frankly I do not know any advantage to the state other than to allow a judge to pick holes in the indictment and to so acquit one he did not want to hang, that the common law indictment possesses. When we have gone into another stage of evolution and amended the cruel code of criminal law, why should we retain any of the technicalities and intricacies of the formal indictment? In our practice, the accused has almost always been before a magistrate and heard the wit-

nesses against him; and he knows perfectly well what is the accusation against him. What else is he entitled to than a simple statement of the charge?

Is not the classical instance of an accused being acquitted because a lawyer laid a charge as "against the peace of state" instead of "against the peace of the state" revolting to our common sense? (Do not think I am criticising the decision, it may have been justified or compelled by legislation or authority.)

Is not the indictment in some states a relic of olden times not only useless but even exceedingly dangerous to the body politic?

The grand jury was once a valuable organ, it stood between the crown and the individual, and often between a powerful individual and one less so. In our own present system, an accusation may be made by any individual against any other. If an examining magistrate thinks that a *prima facie* case has been made out, the prosecution is taken up by the crown. No one can be prosecuted in assize or sessions without the consent of the crown represented by an officer responsible to the government. A grand jury then is not now needed to stand between a more and a less powerful person. To stand between the person and the crown meant something when "the crown" was an individual, the King or some appointee of his; but where—as in our system—"the crown" means the people, it savors of absurdity to think or speak of anything between crown and subject. If the grand jury had not other uses, it does not seem to me that it could or should be retained. Where a responsible counsel certifies on behalf of the people at large that a prosecution should be had, there should be no hesitation in the court to entertain such a prosecution. I can see no more reason for a grand jury giving a decision that a criminal proceeding shall be had, than for such an organization deciding that a civil proceeding shall be taken.

I am wholly incompetent to discuss the manner of selecting juries in vogue in some of the States of the Union; the absolute distrust of fellow citizens exhibited by those accused of crime as well as by those entrusted with the prosecution is inexplicable to me brought up under another system. In some places much more time is often taken up in finding a jury

than we take in the trial of the case itself. Last month I said to the Illinois State Bar Association:

"The first time I met your ex-president, Mr. Taft, he spoke of the intolerable delay in criminal trials in the United States. I told him that a short time before I had gone to a Canadian city to hold the assizes on the same day that a few hours further along the same line of rail, but across the international boundary, a judge began to get his jury in a murder case; that I had tried four criminal cases and seven civil cases, and was home in Toronto before my American brother had half his jury."

I was once present in a Buffalo court and saw two or three jurors of Canadian birth challenged by a counsel who was conducting a case against an Englishman. He did not know that a Canadian is no more an Englishman than a Texan is a Yankee; and seemed to imagine that a Canadian by birth would tend to favor an Englishman born under the same flag. This kind of logic is beyond the comprehension of us simple Canadians who believe in giving every man a "square deal."

Is the practice of days being taken up in getting a jury advantageous to the State? That is for the people of each state to answer.

Of course the intention as avowed is that jurymen shall be found who are not prejudiced—and if it is necessary to go through all this to obtain an unprejudiced jury, I presume the game is worth the candle. But is it necessary? Is this an *appendix vermiformis*, or a useful organ? Every community must answer for itself.

Should an accused be compellable to give evidence against himself? No one reading the state trials but must be struck with the brutality with which those accused of crime were treated by both judge and crown counsel; and indeed the judge was not infrequently counsel for the crown, in fact. In those days even a witness was in great peril if he did not give the evidence expected or desired. It might well be unsafe to rely upon evidence given by an accused in that state of affairs. But we are far past that period. No judge would disgrace himself by inhumanity to an accused (of counsel I shall speak again), and why should not an accused be allowed to convict himself if he sees fit to do so? Evidence given under compulsion we might well object to, but why should not the state put an accused in the witness box and ask him ques-

tions? If he should see fit to answer, why should not his answers be allowed and used as evidence against him? He can give evidence on his own behalf if he wishes, why should the people have the right to require him to go into the witness box for them.

In Civil cases it was long the law that no one could give evidence on his own behalf. About fifty years ago a change was made in England by 14 and 15 Vict., c. 99, after an experiment of allowing such evidence in certain courts, had proved successful, (1846) 9 and 10 Vic. c. 95; the change being completed in 1869 by 32 and 33 Vic. c. 68. Now any one may give evidence in his own case notwithstanding the fears of perjury, etc., which obsessed the ancient lawyers and now any litigant may give evidence on his own behalf, but his antagonist may insist that he shall go into the witness box for *him*. No real reason can be given why one accused of crime should not be allowed to give evidence on his own behalf, and yet it was but the other day that this was possible.

And why provide that the failure to give evidence on his own behalf shall not be made a matter of comment? Every juryman knows the accused can, if he likes, testify on his own behalf; and as in a civil case the failure to testify on his own behalf of a party who must know the facts, may be and generally is the subject of unfavorable comment by judge and counsel, why should this not be allowed in criminal cases as well?

One reason why an accused should not be compelled to give evidence plausible but not, I think, sound, I can see. It may be that the accused fears cross-examination upon his story and perhaps his past. This is done in civil cases, and why not in criminal cases? If the credit of a witness is to be affected by his life, what difference is there in civil and criminal cases?

All this restriction is part of or intimately connected with the traditional law that no one should be compelled to condemn himself. There was some semblance of reason in such a rule when the criminal was not uncommonly one who had offended the powers that were, and too often it was to be feared that the self-condemnation was brought about by torture. But now the criminal is always the enemy of society, of the people and not of the king or government. No one desires the destruction of the accused because he is he, and irrespective of whether he has committed a real crime. The

whole concern of the prosecution is to investigate whether the accused has committed an offense against the people; not only does the law not desire the punishment of an innocent man, it does not desire the punishment of a man who cannot be proved guilty.

Is there any sound reason for preventing the state from asking an accused his version of the facts?

So, too, in the case of husband and wife: the same reasoning applies subject to the right of husband or wife to decline to answer, and also to the provision that no communication during marriage shall be disclosed. This last provision is introduced for ethical reasons. It is probably better that there should be full, free and frank disclosure and discussion between spouses than that in cases of alleged crime one should be compelled to disclose any such communication to the prejudice of the other. No doubt the rule comes from the common law doctrine that husband and wife are one; if it should ever be that marriage is considered just the same as any other contract and voidable at the option of the parties, much of the reason of the rule would disappear, and communications between husband and wife would perhaps become like those between solicitor and client, disclosable when they refer to intended wrongdoing. In our law we can compel husband and wife to testify against the other in certain crimes, why not in all?

I have spoken of the prosecuting counsel. Much of the dignity and propriety of a criminal trial must depend on him. In our law, the theory is that counsel for the crown, whether the permanent officer, the county crown attorney, or the temporary, appointed for a particular assize or a particular case, represents the people, in our terminology, the crown. It is his duty to lay before the court and jury all the facts no matter how they may tell; he must bring out those which may exonerate as well as those which onerate the accused. Of course he is not to allow himself to be hoodwinked by those who, while affecting to tell the truth, are really twisting facts to help the prisoner, and equally of course, he must cross-examine the witnesses for the defense to find out how far they are to be relied upon; but when he has brought out all the facts and summed them up fairly for the trial tribunal, his duty is done, and he has no concern with the verdict. Concealment or suppression of facts, undue severity in cross-

examination, unfair summing up, pressing for a conviction are bad form and against the ethics of the profession; they are quite certain to meet the disapprobation of the profession and the public (including the jury), and are more than likely to call down upon the offender the rebuke of the trial judge. In the existing state of humanity the ardour of battle is to be expected now and then to cause conflicting counsel to transgress, but I can say from a long and varied experience that the instances are exceedingly few in which the prisoner can reasonably complain of the conduct of the crown counsel.

This is a reason for changing the old practice whereby the accused cannot be asked to enter the witness box.

If, indeed, his standing at the bar or before the public, if the probability of his continuing to occupy an office of dignity and importance,—if not of great emolument,—depended upon success in procuring convictions, it could easily be understood that a prosecuting counsel would naturally strain every nerve for a conviction, right or wrong. This, however, could only be under an essentially vicious system.

The former theory that a person who had once been convicted of a crime, or at least of perjury, should not be allowed to testify, we have got rid of, as you have in Wisconsin; and now none so poor a lawyer as to do it reverence. That relic of a former state of law the surgeon's knife of legislation has removed for ever.

Expert witnesses we have; but they are, except by leave of the court, restricted in number to five on each side. We keep them well in order, and confine the evidence to the exact point upon which they are to give an opinion. For example, the defense of insanity is available only to one who at the time of the alleged offense was "laboring under natural imbecility or disease of mind to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission is wrong." A medical expert is called to prove or disprove insanity. He is not allowed to express an opinion as to what should be done with the accused, whether he is likely to recover, whether he is "legally insane," or anything but the neat questions, "1—Was he capable of appreciating the nature and quality of the act or omission? 2—Was he capable of knowing that it was wrong, i. e., wrong in the sense of being contrary to law?" Reasons for the opinion of the expert may

be and generally are asked; but in most instances the expert evidence takes up little time. Perhaps I may add that in my experience it has little influence with the jury occasionally, indeed, less than with the judge. We have a hard headed lot to deal with on our jury-panels, not much given to sentiment and with a decided antipathy to homicide.

The result is that our criminal trials are not very long. I have known but one lasting more than four days, most do not last two, none before me has lasted for more than a day and a half.

We still retain the requirement that the jury must be unanimous in criminal matters. Why we should not be satisfied with the verdict of ten as we are in civil matters but insist on a verdict of the whole twelve, I cannot say. In civil matters it is the Province, in criminal, the Dominion which prescribes the practice. It may be that Ontario has made an advanced step ahead of the Dominion, or it may be that the determination of the Dominion *stare super vias antiquas* is wise conservation.

Our Ontario system of requiring only ten jurors was introduced to prevent the disagreement of a jury by the unreasonable conduct of one or perhaps two jurors. It has now been in force for about twenty years (since 1895, 58 Vic. c. 16, s. 1), and no one would think of going back to the old system. Most of the inconvenience that might otherwise result from disagreements in criminal cases is obviated by a not uncommon practice of calling a new jury at once and proceeding forthwith with the new trial. I have never known this to fail in bringing about a verdict. No such disadvantage has arisen from the present practice as to produce any popular demand for its modification; I cannot say that there is any body of judicial, professional or popular opinion looking toward a change.

It does not seem to be quite settled how far at the common law a proceeding in the nature of an appeal could be taken in criminal cases. That one tried for his life should have no redress when the judge in a court of oyer and terminer made a mistake or where the verdict was clearly against the evidence, while in a case involving a few shillings he might take the opinion of the full court and perhaps of the highest court in the land, was undoubtedly anomalous.

For a time we had in Canada the convenient practice of the trial judge reserving a case for the opinion of a Court in Banc upon matters of law arising during a trial. This had, however, the disadvantage that there was no means of compelling the judge to reserve a case, and while I never knew a judge to refuse to state a case when desired to do so, there was always danger of injustice being done. Our present system is for the judge to state a case on any question of law either on request of crown or defense or *proprio motu*. This case so stated comes at once before an Appellate Division of five judges. One Appellate Division or the other is always in session and consequently there is no delay; and a very few days will suffice to have the matter heard and disposed of. (The Chief Justice of the State across the Lake from Ontario is reported to have declined to sit to hear the Becker case because the decision might not be ready before his term expired, some months later. This would be impossible under our system.)

If the trial judge refuses to state a case, an application may be made to the Appellate Division to compel him to do so. If the Appellate Division think a case should be stated, sometimes the application is treated as the case which should have been stated and judgment given accordingly—this was done in a murder case in which I refused to state a case; a new trial was ordered. Or an order is made for a case and the trial judge states a case which is argued and disposed of without delay. The case may be amended during argument; the prisoner is not present and technicalities are ignored. The court may confirm the ruling, order a new trial, pass the proper sentence, direct the discharge of the accused, or "make such other order as justice requires." No conviction can be set aside for improper admission or rejection of evidence or misdirection or other thing not according to law unless, in the opinion of the court some substantial wrong or miscarriage has thereby been occasioned at the trial. If the wrong or miscarriage affect some count only of the indictment, the court may give separate directions as to each count and pass sentence on any count not affected which stands good. If the Appellate Division should not be unanimous, the convicted person may appeal to the Supreme Court of Canada—a very rare proceeding. In theory also, any sub-

ject has the right to appeal to his majesty in council—which is still rarer, and indeed negligible.

The trial judge may also give leave to a convicted person to apply to the appellate division for a new trial on the ground that the verdict was against the weight of evidence. I know of but one instance of the kind, and that unsuccessful.

We have known no more formality, technicality or "frills" in criminal appeals than in any other; they are disposed of with speed and on the same principles and footing as civil appeals.

It may be of interest to know that the option given to an accused, in most instances, of trial by a judge without a jury is very commonly taken advantage of. In Toronto, in 1913, there were nine criminal cases tried in the supreme court, 118 in the sessions and 371 in the county judge's criminal court. It has been estimated that two-thirds of the cases triable at the sessions which come before the police magistrate in Toronto are tried by him; and a large percentage of those who before him elect a jury trial change their mind and are tried by the county court judge.

In our civil practice we are trying most cases without a jury. In the lowest court, the division court, less than one-fifth of one per cent. are so tried. This may be due in part to the fact that in this court any litigant desiring a jury must deposit in court the probable cost (about ten dollars on the average), this expense forms part of his judgment if he is successful. In the intermediate court—the county court—in Toronto in 1913 eighteen per cent. were tried by a jury; in the Supreme Court about twenty-six per cent. In neither of these courts do the litigants pay for the jury. Year by year we are trying fewer and fewer cases with a jury.

It requires no argument to convince any thinking man that the two qualities of certainty and speed are of much greater value than severity of punishment as a deterrent. If every lyncher were certain to get ten years in the penitentiary and that within a year of his crime, lynching would become most unpopular; it would almost disappear. We have never had a lynching, and our mining camps never produced a Bret Harte hero. A reasonable certainty of ten years imprisonment beginning within one year of the offense would be more deterrent than a reasonable certainty of twenty years

beginning five years after the offense, and either much more effective than a mere chance of hanging. Is not any system vicious which lends itself to delay? And is not a speedy system vastly preferable to one in all other respects equal, but dilatory? With us, as I told your Illinois brethren the other day, "we think in the Dominion, if a Canadian murderer is not hanged within a year of his crime, he is justified in complaining of being deprived of his just rights, given him by Magna Charta"—*Nulli * * * differemus rectum aut justitiam.*

And why should one accused of crime be set free because a lawyer has made a blunder in putting something on paper or in omitting to put something on paper? If he has had full notice of the charge against him, full opportunity of seeing and hearing the witnesses, of producing witnesses on his own behalf and giving his own version if he wished to do so, then if the case is satisfactorily proved against him, what more should he have? Why should a trifling error in form or in procedure, not affecting the merits and not doing any real harm, be sufficient to enable a rascal to escape just punishment?

As has already been suggested, most of the rules which in some jurisdictions give effect to trifling defects have their origin in the dark times of the law when death was the penalty for a trifling theft. Humane judges *in favorem vitae* seized every means and availed themselves of every loophole to let an accused escape from a too severe punishment, even if that involved letting him escape from all punishment. Can there be any good reason why such a course should be followed now when the law is humane and the punishment is made to fit the crime?

Notwithstanding all due care and desire to do the right, the courts must admit that they are not perfect—the common failings of humanity are not at once put to flight on receipt of a patent. Circumstances may come to light which show that a fair trial has not been had. In our system the Minister of Justice is given the power to direct a new trial. This has been done at least once upon the discovery of new evidence. Or although the convict has such a degree of mental soundness as to come within the law, he may be so insane that it would be unwise to punish him by death. The Minister of Justice may (and where there is any ground to think there

may be insanity, almost invariably does) cause him to be examined, and if he is really insane may recommend commutation, including imprisonment in the Criminal Lunatic Asylum.

During the French Revolution the power to commute punishment duly directed by the court was taken away from the authorities. One very celebrated and very horrible case occurred in which the condemned was certainly innocent and yet he must suffer because no one could interfere with the sentence of the court. That instance was enough (even if such an example had been needed) to show the necessity of vesting in some authority the power to commute punishment. This power is given to some one in every civilized state, generaly to the executive head.

In our system, the judge before whom a criminal trial is had, must, if the sentence of death is imposed, send forthwith to the secretary of state a report of the case. He sends a transcript of the shorthand notes of the trial, with such other material as may be necessary. This goes to the Minister of Justice whose duty it is to examine the proceedings and to advise commutation or otherwise. In any other case the judge may report if he sees fit, and in any case he may make recommendations to the Minister. So, too, in the case of any one under sentence, however light or severe, the Minister may, and upon request always does, make inquiry into the case, obtaining a report from the trial judge, etc. Our Minister of Justice, it will be seen, has the functions of the Home Secretary in London.

I do not think it well to say anything of the substantive law.

If I were to be asked to give the salient points of difference of our practice a that of the ordinary state of the Union, I would say:

1—The abolition of the old and useless distinction between felony and misdemeanor.

2—The privilege given an accused (except in the case of a very few crimes) of being tried without a jury by a judge.

3—The abolition of all technicality in indictments and in all other proceedings, and generally the minimizing of form.

4—The speed with which a jury is had, a trial held, an appeal disposed of, and punishment begun.

Every state must choose for itself what it prefers. We have made our choice, and find it answers our conditions. I do not presume to advise any other people, but may be allowed to say to you what I said to another gathering of lawyers a few weeks ago. After speaking of the former condition of criminal law in England, I continued:—

"Accordingly, the prosecution of an alleged offender became a kind of sport. The prisoner had so much of a start; so many proceedings were forbidden to his pursuers; he might double and dodge and in the end, in spite of facts wholly proved, might escape. It was a kind of glorified fox hunt, the quarry having a much greater chance than a fox.

"This was about the condition of the law in England when the United States branched off and when Upper Canada was given legislative independence. Both took the law with them. The rights of the accused, the protection of the accused, gave the watchword; and some courts have not forgotten it yet. In not a few courts the prisoner has so many and so sacred rights that no one else has any, the state included. Instead of its being a solemn inquiry by the state into a crime alleged to have been committed against it, a criminal trial is apt to degenerate into a game, a play, a spectacle for the curious, a subject for lurid newspaper writing. The provision made by the state for its own protection that no one shall be punished until convicted by a competent court is made a cloak to shelter those who have undoubtedly committed crime; the pettiest of all petty technicalities are invoked as though they were the most profound of principles, on the violation of which the heavens should fall. Time seems not to be considered of importance in many jurisdictions; and in one, the members of the Bar say openly that a conviction for murder is but the beginning of the criminal trial.

"Solemnity and formality in a criminal trial have great influence upon the criminal classes. Severe punishment has not at all the same deterrent effect as certain and speedy punishment. Many a degenerate or wilfully wicked person would be willing to be made the central feature of an eight days' or eight weeks' show with a good chance of evading punishment. Is all this good for the State? * * * If the people really want that sort of thing they must have it; but do the people really want it? Of course the criminal classes, the potential criminal, the lawyer who is paid by the length of

time he can make a case last, or who seeks glory from technical ingenuity or florid rhetoric, the yellow and near yellow journal and its readers, all are in favor of it. But the man who has to pay for it, the sober minded citizen who takes an interest and a pride in his country, who is jealous of her honor and reputation—what of him? And is he not to be considered?

"If a criminal trial is a game, well and good. The fox hunter who was expostulated with on the cruelty of his sport said, 'The men like it, the horses like it, and nobody can be certain that the fox does not like it.' But even fox hunters pay for their game out of their own pocket, and if a fox does get away now and then, there is no great harm. We in Canada are too poor to be willing to pay for such a sport, too busy to be willing to waste weeks on an investigation for which days or even hours are ample. * * * When a trial is set, we insist on it being proceeded with, with due diligence and reasonable speed."

When the people want a criminal trial to take the place of a free theatrical performance, they will prefer one method. When they want it to be a serious and dignified investigation by the state into an alleged offense against the state—the people—they may prefer another. Every country has the law it deserves.